RESTRICTING FREE SPEECH AT THE SOURCE:
THE FIRST AMENDMENT AND THE NATIONAL SECRECY SYSTEM

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The National Secrecy System

In the name of the common defense and of national security, of survival, and of extending the geographic breadth of freedom, the American System has initiated, encouraged, sanctioned, and tolerated a heavy shroud of secrecy over part of its political process. Secrecy is maintained both through recruitment of government workers who are "cleared", and through application of a system of classification to information generated within the government. The set of activities which produce on the one hand cleared personnel, and on the other, classified information, I will call the National Secrecy System.

The legal network underlying the National Secrecy System is a thicket. The Government Security and Loyalty Manual, based on the latest version of The Department of Defense Industrial Security Regulation 5220.22-R, identifies no less than 11 statutes, seven executive orders, and one Federal regulation as applicable in the security and loyalty context. Others[1] have identified, in addition, the Federal Agency Housekeeping Act of 1789 (5 U.S.C.A. 22), as amended in 1958, The Administrative Procedures Act of 1946 (5 U.S.C.A. 1001-1011), Article II, Section 3 of the United States constitution, and common law precedents as discussed in annotation, United States ex rel. Touhy V. Ragen, 95L. ed. 427-34, as providing justification for that portion of the National Secrecy System involving the classification and withholding of information.

In writing on the loyalty program or on the secrecy system as a whole some have seen fit to focus on the harm that recruitment procedures have caused individuals, or on the political damage which secrecy does to American Politics. I share these concerns. However, my purpose is to focus attention, not only on the costs of the National Secrecy System, but also on its constitutionality, that is, on its consistency with the first and fifth amendements of the Constitution, and with the Constitution taken as a whole.

The cornerstone of the secrecy system, and therefore the portion which will occupy us most centrally, is Executive Order No. 10501, of 1953, as last amended by Executive Order 11382 of 1967.[2] This is the Executive Order which defines the three categories of classification used for National Security purposes, Top Secret, Secret, and Confidential. Later on, I will analyze portions of this Executive Order relating to its constitutionality. Here it is enough to

point to the unequivocal purpose of Executive Order 10501. This is to protect uniformly against unauthorized disclosure certain official information affecting the national defense, where the "interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile action by covert or overt means, including espionage as well as military action . . . "

The stated purpose of this order then, is limited, as constitutionally it must be, to protecting information whose disclosure will tend to undermine the physical security of the United States in the sense that it adversely affects our ability to resist, or to withstand, physical coercion, or perhaps an as yet undiscovered, and extremely effective technique of psychological warfare. The purpose of the order however, is not, at least ostensibly, to restrict the flow of information to the public - as it begins, "whereas it is essential that the citizens of the United States be informed concerning the activities of their government. . ."

Again, the executive order is intended to provide guidelines for withholding information essential to national defense, but not to provide a framework for the Executive personally, or for any Executive agency, to withhold information which might prove harmful to themselves in the domestic political struggle to legitimize the Executive's foreign policy, national security policy, or conception of national goals. The decision to classify is supposed to be politically neutral; it is not meant to be used as a tool, among many others, for augmenting the President's, or the Secretary of Defense's, or any Lt. Colonel's leverage in relation to pursuing his own concept of the "best interests" of the United States.

The Political Use of the Secrecy System

Though the classification system is not supposed to be used as political protection against "premature disclosure" of contemplated or actual national policies, this is one of its major operating functions, as has been noted by many others.

During the current Senate Judiciary Committee hearings on government surveillance of citizens much is being made of the fact of surveillance of citizens by the Department of Defense and in particular, Army Intelligence. The constitutionality of Army Surveillance for the purpose of monitoring civil disorders is in question. More significant in the present context however, is the fact that information on DOD surveillance activities has itself been classified. While classification of details of the surveillance network is, given the Army's basic assumptions, perhaps justified on grounds of the integrity of the surveillance organization itself, the general character, purposes, and existence of Army surveillance is a political question, and seems totally unrelated to the explicit national defense purposes of Executive Order 10501. This information should not have been classified, just because it is political in character. The probability that early disclosure of Army plans for surveillance would have led to their abandonment, further underlines my point. An Internal Security Policy involving surveillance is a matter to be decided upon through the most sober, open, political debate, because a decision like this is central to the continued existence of free society. National defense demands that such a decision not be taken by the Law Enforcement and Military Establishments, but by the people acting through their elected representatives in Congress. Even then there is the larger question of constitutionality, of the extent to which surveillance is consistent with the First Amendment.

Examples of the use of classification to hide political decisions are to be found in the most significant areas of national policy-making, and these raise the question of whether recent policies have not been decided upon in such a way as to deprive citizens, at least in part, of their right of due process of law under the Fifth Amendment of the constitution. We will return to this question later on, here we can attempt only a brief description of incidents of classification which appear to be improper when weighed against their political implications.

The Tonkin Gulf Incident of July-August 1964, is a central trigger event in the historical process of U.S. Vietnamese involvement. It led to the joint congressional resolution which President Johnson used as partial justification for the immense military buildup later undertaken. Yet the facts of the Tonkin Gulf incident as these were recorded on the Destroyers Maddox and Turner Joy are still classified. There is, of course, an official American account of the incident. But this account is notably lacking in details of the "provocation" that was supposedly the cause of Mr. Johnson's retaliatory air strikes. Photographic evidence, which often accompanies American presentations of key incidents was absent in this instance. Considering the significance of the Tonkin Gulf Incident in retrospect, the de-classification of all papers relating to it would seem to be in order. Such records can have no effect on the military defense of the nation. They can however, affect political evaluations concerning the basis of our increasingly heavy involvement in Vietnam during the ensuing years. They might have had a critical effect on the elections of 1968, in that two entirely different nominees might have been contending for the Presidency, if as is possible, declassification of the Tonkin Gulf record had discredited either the Military or President Johnson.

Continued secrecy over the background of the Congressional Resolution supporting the Vietnam War is but one instance of secrecy used to suppress political issues relating to our South-East Asian policy. There are currently more than 40,000 American troops based in Thailand, as well as thousands of civilians who are actively involved in counter-insurgency activities of one sort or another.

While the facts of American activities in Thailand as these relate to day-to-day operations against anti-government forces cannot immediately be revealed, this is not the only sort of information which the U.S. Government sees fit to classify. Also classified is information regarding both the type of military aid given to the Thais and analyses of the impact of this aid on Thai Society.[3] Details of Psychological Operations in Thailand (and incidentally

in Vietnam as well) are also classified. It is not enough in this context to justify classification by merely asserting that Communist agents could use such information to thwart counter-insurgency efforts. Knowledge of the general character and scope of American activities in Thailand is essential to a public evaluation of the wisdom of our continued involvement in both that country and South East Asia as a whole. Since the public's stake in disclosure of such information is large, the government's justification for secrecy must be very weighty. There are however, no explicit justifications for classifying information about our Thai involvement beyond merely the judgment of functionaries that certain documents fit the definition of Top Secret, Secret, and Confidential, given in Executive order 10501.

Jeremy Stone[4] has recently offered an interesting comment on the effect of secrecy on the Multiple Independently Targeted Re-entry Vehicle (MIRV) program during a discussion of the destablizing tendency of MIRV on the Arms race.

> "The reason we are in such trouble with the MIRV program is because of secrecy. This is an important object lesson. Nobody has been making loud public objections to the MIRV program, the way they have for years to the ABM. The reason is interesting: when the Defense Department first thought of MIRV, its second thought was, "If the Russians got this they would be able to destroy our Minuteman Missiles." So Secretary McNamara directed that this had to be highly classified and that nobody should talk about it. As a result the debate was shut off for three years while the program got under way.
>
> Now, if you talk to Senators in the ABM fight and ask them to call for a stop on ABM and MIRV, they say to you, "Look there has been no outcry about MIRV. We have problems already with the ABM. We can't take on both of these until there is public pressure for it."

Stone does not comment on the validity of McNamara's dictum concerning classification. Strategic debate about MIRV's impact on the Arms Rule and on American Foreign Policy should not have been classified by the administration. Insofar as this was done the political process was short-circuited and the result may be the expenditure of many billions of dollars provided that we go ahead with MIRV and that the result is an escalated nuclear arms race.

Examples of the use of classification in connection with issues of central political significance could be multiplied. The general point however is that the classification system laid down in Executive order 10501 is probably quite often used for political purposes, demonstrably so in at least a number of cases where the use of secrecy has by inference had great impact on the course of recent history.

In general we may say that classification limits, delays, distorts the course of, or prevents political discussion over key areas of foreign and military policy. Classification is one variable which structures policy alternatives in these areas. It thus, channels, limits, affects and prevents free speech. It restricts the electorate's visible, practical, policy choices. It restricts free speech at the source by preventing the formation of those beliefs that would occur partly as a result of access to classified information. It diverts the stream of the democratic political process according to those parameters, and preconditions, set forth by a minority: the minority of [illegible] comprising the foreign policy and military establishment who control the availability of classified information. In the nature of things a minority must always propose while the majority disposes. But in a democracy there must, as nearly as practicable, be an equal chance for anyone to become a member of the policy proposing minority.
member of the policy proposing minority.

The National Secrecy System as it is used today is fundamentally undemocratic, for it maximizes, to the point of managed consent, the influence of the minority which happens to be in control of the Executive and military establishments. Others[5] have made similar points during discussions of Executive Secrecy, and have proceeded to call for reform of the secrecy system--an essentially political appeal. But the assumption has been implicit in earlier writing that the executive is within his legal rights in sustaining Executive Order 10501. I would raise however, the issue of constitutionality of the Executive order for examination.

Constitutionality

There are, I believe, grounds on which to doubt the constitutionality of the cutting edge of the National Secrecy System, Executive Order 10501. These grounds will be discussed in relation to the First Amendment, the Fifth Amendment, and the Constitution considered as a whole.

The First Amendment states, of course, that "Congress shall make no law . . . abridging the freedom of speech, or of the Press; or the right . . . to petition the Government for a redress of grievances." First Amendment interpretations by the Supreme Court are in flux, however. Confusion reigns especially in the area of the relation of First Amendment guarantees to the constitutionally mandated duties of the executive to provide external or internal security.

Two general doctrines relating First Amendment freedoms to the various areas of their possible application are currently dominant. These are the Ad hoc Balancing test,[6] and the Absolute[7] test.

The ad hoc Balancing test is first encountered in Chief Justice Vinson's opinion in American Communications Association V. Douds, 329 U.S. 382 (1950). It provides that:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented . . ."

As Emerson put it,[8] the general "formula is that the Court must in each case balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression."

The "Absolute" test, on the other hand, views the first Amendment as providing a general criterion of law with respect to which individual cases must be interpreted. That is, the Court's task is to focus,[9] "inquiry upon the

definition of 'abridge, 'the freedom of speech', and if necessary 'law', rather than on a general de novo balancing of interests in each case." In this manner the "meaning" of the first amendment in concrete contexts can be fleshed out with the passage of time in accordance with a general framework appropriate for judicial interpretation. Most important is the notion that this general framework, the first amendment, represents the framers' attempt to assure an effective system of freedom of expression. In adopting the Amendment they have established a "prior balance," which commits the United States to certain necessary requisites of the system of free expression itself. These requisites are stated by Emerson as:[10]

> "expression must be freely allowed and encouraged; . . . it may not be restricted either for the direct purpose of controlling it or as a method of obtaining other social objectives; . . . the attainment of such other objectives is to be achieved through regulation of action."

The leading proponent of the Ad hoc Balancing test until his retirement from the Supreme Court was Mr. Justice Frankfurter, and of the Absolute test, Mr. Justice Black. Mr. Justice Harlan is the main proponent of balancing still remaining on the Supreme Court.

Over the last two decades the Ad hoc Balancing test has retained its place as the more dominant of the two major positions on the Court. But nothing is more certain than that the Court as a whole adheres to neither or either of the two tests in the majority of first amendment cases.[11]

"Melding" of the two standards has taken place. In addition other doctrines such as "preferred freedoms", "clear and present danger", "void on its face" and "reasonable alternatives", have, at times, been employed. Judicial interpretation of the First Amendment then, provides no clear guidelines for an analysis of the likely constitutionality of the Executive's system for classifying information. It does however, provide a somewhat disorganized conceptual map with particular doctrines occupying particular locations. If we fit not one conceptual node of the map onto the secrecy issue, but instead eclectically fit all those nodes which may be relevant, we should be able to carry out the desired analysis of constitutionality.

To begin then, we consider the ad hoc balancing test in relation to Executive Order No. 10501.

The Balancing Test has traditionally been used in conjunction with judicial restraint. In practice, it has meant that the Supreme Court, in certain areas, will accept the legislative balancing of interests, which has resulted in the passage of a law, as "reasonable", and therefore beyond the competence of the Court as a judicial body to pass upon.

Of course, such restraint is not a necessary concommitant of balancing. It is plausible that if a government regulation is judged as having a serious enough impact on freedom expression, only a showing by the government that the regulation is essential to the survival of the United States would weigh heavily enough to save it. The question then is whether the National Secrecy System in view of instances of harm, such as those above, to which it has contributed, is so very essential to the physical existence or continued sovereignty of the United States.

Undoubtedly, a good case can be made by both the proponents and opponents of secrecy, on both sides of the proposition of the necessity for secrecy. In such a situation, the balancing doctrine would most likely be used to support the notion that secrecy is essential. This, in the past has been the judgment of both Congress and the Executive. The Court will not likely turn its back on the past in this respect.

But if some system of secrecy is necessary it does not follow that the system of classification represented by order 10501 need be a necessary component of that system. A balancing approach to the issue may still result in invalidating the order if balancing is supplemented by other doctrines.

Thus, in the context of an overall balancing approach Executive Order 10501 may first be attacked for the vagueness of the classification standards it sets up. In the order, Top Secret information is characterized as material,

> "The defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation, such as leading to a break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations or scientific or technological developments vital to the national defense.

Words like "paramount", "grave damage", "leading to","affecting the defense of the United States", "vital to the national defense", are all systematically vague terms without concrete legal precedents in the National Security - Secrecy context.

Similar, or still more serious, vagueness of construction applies to the Secret and Confidential categories. Secret information is information whose unauthorized disclosure could result in serious damage to the nation, or could jeopardize our international relations, or could endanger the effectiveness of a policy or program of vital importance,or could compromise important military, defense plans, scientific or technological developments,or information revealing important intelligence operations.

Confidential information is that, the unauthorized disclosure of which, could be prejudicial to the defense interests of the nation.

The spirit of the classification system is obviously to classify documents whose circulation would seriously threaten, in something close to a clear and/or present (to paraphrase somewhat) danger test sense, the physical security of the United States. As I indicated earlier, the classified information would, if circulated, most probably lead to a circumstance in which the United States could be physically coerced or psychologically controlled (for example through electronic tampering with the brain).

But the categories described above obviously go far beyond rules consistent with such a limited, and legitimate, National Security purpose. Clearly almost any information at all, information about the culture, temperament, numbers, economic history, philosophic propensities, fertility, even gastronomic preferences, of the American people, could b prejudicial to the defense interest of the nation, given the right circumstances, and the wrong intentions.

And in just what does jeopardizing the international relations of the United States consist; perhaps weakening the war effort in Vietnam through protest at home. If so, does this justify the classification of information as Secret, where such information might give political ammunition to dissenters?

Was General Ridgeway's letter,[13] at the time of his retirement as Army Chief of Staff, protesting against a cutback in the strength of the Army, so potentially damaging to the nation that it merited a top-secret classification by the defense department of President Eisenhower? Or did it compromise military or defense plans vital rather than merely just important to the national defense?

The point, of course, is that the standards of Executive Order 10501 are so vague as to allow arbitrary classifications, actually based on implicit political criteria, to be carried through by military and foreign policy officers. The executive order as written does not highlight a necessary conflict between free speech and national security which must be balanced, but rather the order is a wholesale invasion of the realm of free expression through use of a vaguely specified classification system, which must, by its nature, restrict the free flow of information.

Whether or not the classification system set up by Executive Order 10501 is too vague, the doctrine of Reasonable Alternatives may be applicable in the present situation. If a regulation has the effect of restricting free speech, it may not be upheld by the Supreme Court if another method of achieving the government's purpose is available that would avoid unduly restricting expression. The individual must only show, if the court applies this doctrine, that his

interest in free speech outweighs the government's interest in security, as the latter is expressed in the unique regulation being challenged, not its interest as expressed in other reasonable alternatives to the present classification system.

Of all the tests the Court would be likely to apply to litigation challenging the constitutionality of The National Secrecy System, the most favorable to sustaining the system is the Ad Hoc Balancing test. A "clear and present danger",[15] or "void on its face",[16] test would surely take issue with the overly broad wording of the order. A "preferred freedoms"[17] test would do likewise, and would probably further lead into a search for reasonable alternatives to the government system.

But the doctrine that would be most favorable to a finding of unconstitutionality would be the "Absolute" doctrine, already briefly described. The "prior balance" notion inherent in the Absolute test insists on wide ranging discussion, debate and disclosure of external security policy as essential to the maintenance of a democratic system. As long as the free flow of information will not obviously result in physical harm to the United States, freedom of expression "must be allowed with respect to such matters as general opposition to a war, criticism of war, or defense policies, and discussion of particular measures whether related to direct military or supporting action."[18] This means that government information whose primary reason for classification would be to head off such political effects would need to be disclosed.

Of course, even "absolutists" recognize the need for removing some information from the democratic process. Emerson[19] mentions that specific military operations, military secrets, military personnel when operating in that capacity, access to military operations, and certain dealings with foreign governments are beyond the reach of the first Amendment. Just what its limits are however, is still hazy under the "Absolute" interpretation. Meiklejohn has suggested that free speech can be abridged[20]

> ... only in the social situation, which for the time renders the community incapable of the reasonable consideration of the issues of policy which confront it . . .

In the abstract this covers the instances of military secrecy mentioned by Emerson, and also such matters as top level Executive deliberations during events like the Cuban missile crisis. It does not justify however, long term classification of State papers recording diplomatic activities, or military events, or any material, which though there may have been immediate need for secrecy respecting it, is now relevant to public deliberation of the performance of the executive or his military subordinates.

Fifth Amendment grounds for challenging Executive Order 10501, are tenuous because there is little precedent even obliquely related to them. Nevertheless, a challenge through the requirement of due process of law is conceivable. The legality of removal of life, liberty or property from the citizen as a consequence of his conforming to government policy depends upon representation of the individual through the electoral process. The heart of this process is the effectiveness of the citizen's vote.[21] If his vote is made ineffective, then his role in the electoral process, his voice in selecting a representative, his say in determining whether he fights in Vietnam, or pays a tax, is diminished. His liberty is removed without due process of law.

The question then, is to what extent does the Secrecy system make ineffective the votes of citizens by restricting the climate of election campaigns to those issues arising from the subset of all information which is public.[22]

During the early days of the Vietnam War governmental secrecy undoubtedly hindered the growth of awareness in the United States about the character of the Diem regime, and about the neutrality, if not active hostility of the Vietnamese rural population to the United States. Secrecy surrounding our activities in Thailand now hinders a full debate over our involvement. The effect of secrecy in instances such as this is to polarize the alternatives relative to the issue area in question. One can, on principle, be in favor of the government's policy, or one can, on principle, be against it. But alternatives which are reasonable in the sense that their value implications have been clarified through public debate are difficult to formulate in such an information-poor climate.

The result is that consent for government policy or opposition to it, is managed consent or opposition. It is not an expression of the people's will which serves to make a governmental elite responsible to the electorate. It is, instead, consent or opposition in which the people's vote is merely effective in legitimizing a governmental elite or an anti-government counter-elite. This is a fundamental deprivation of liberty.

To this point I have considered the relation of the Executive Classification System to the First and Fifth Amendments, without properly considering the right of the Executive to withhold information, the right known as "Executive Privilege". Executive Privilege raises the question of the relation of the freedoms guaranteed by the Bill of Rights to the constitutional provisions, common law precedents, and statutes which define the role of the Executive in our system vis-a-vis his right to internally administer the departments and agencies he heads.

Freedom of speech and the press require, for their operation, a right-to-know that which is of general political concern. Executive Privilege[21] is the right of the President, in the absence of express provisions to the contrary, to decide what records of the executive department may be withheld and what disclosed.[23]

Here is a flat contradiction which only a view of the Constitution, taken as a whole, can resolve. If warrant exists for a discretionary assertion of Executive Privilege than the arguments previously advanced against the Classification System are invalid. For the Executive may classify what he pleases, according to whatever standards he sets down, at least in the absence of explicit Congressional challenge, through the passage of statutes.

Though the President's powers to withhold information may be supported by Common Law,[24] and by such statutes as the Federal Agency Housekeeping Act of 1789 (5 U.S.C.A 22)[25] as amended in 1958, and The Administrative Procedures Act of 1946 (5 U.S.C.A . 1001-1011), the key to the constitutional problem obviously lies in Article II, Section 3, and the First and Fifth Amendments to the Constitution. For if Constitutional authority for Executive

Executive Privilege has heretofore often been discussed in terms of the right of Congress to Demand and Receive Information from the Executive. Thus, the issue is cast in terms of struggle between branches of the government, and it seems plausible, in this context, that the Executive may by rights withhold its private papers from the Congress. But neither the Executive nor the Legislative branches of government are co-equal with the People. The issue is not Executive Privilege vis-a-vis the Congress, as a justification for the National Secrecy System. It is, rather, what the Executive can properly withhold from the people at large. The only answer consistent with the First Amendment is that the Executive can withhold no information relevant to citizens' deliberations over policy unless that information violates the rights of privacy, itself a first amendment freedom, or is significant to the military and foreign policy functions of the nation in the strict sense discussed earlier. Executive Privilege, in short, must be limited by the needs of an effective representative government.

This look at the relation between the First and Fifth Amendments, and Article II, Section 3, supports my earlier analysis of the unconstitutionality of Executive Order 10501, and of any Executive order which unduly restricts the free flow of information on political issues. It is fitting to end this examination of the constitutionality of the Classification System with a quote from Woodrow Wilson about legislative secrecy which however, is quite appropriate for the Executive and the military.[29]

> Those are private processes. Those are processes which stand between the people and the things that are promised them, and I say that until you drive all those things into the open, you are not connected with your government; you are not represented; you are not participants in your Government. Such a scheme of government by private understanding deprives you of representation, deprives the people of representative institutions. It has got to be put into the heads of legislators that public business is public business.

Remedy: Toward a Constitutional National Secrecy System

A system of Executive Secrecy in the national interest must deal specifically with the interests involved rather than with the generalities which have until now been characteristic of our system. Of course, general purposes ought to guide the system or the choice of specific interest areas will be arbitrary.

Executive Secrecy ought first, to protect the rights of privacy of those transacting business with the Executive Branch. Of course, the right of privacy in this context must be weighted against the right to know. Both are First Amendment rights and a "prior balance" cannot be established in favor of one and against the other.

The other important need justifying secrecy is national security, in the very specific sense. That is, the ability of the United States to resist or to withstand physical coercion, or conquest through psychological manipulation must be protected. At times such protection will require secrecy because of a fairly immediate causal connection between disclosing information and placing the United States in danger of experiencing physical or extreme psychological damage.

Applying these two loosely defined purposes to the problem of constructing a constitutional secrecy system I have arrived at the following outline of one.

First, I think the gradations of Secrecy into Confidential, Secret and Top Secret, ought to be replaced with the dichotomy Classified or Unclassified, where Classified corresponds to Top Secret. The test of a fairly immediate causal connection between disclosure of information and likely damage to, or coercion of the United States, leaves little room for gradations. If damage or coercion is likely this seems to me to be a strong enough justification for the equivalent of a Top Secret classification to be used. If the danger is not this great, the demands of free speech seem paramount, just because the judgment of damage, danger, inconvenience, damage to American values, or what have you, will be to some extent politically controversial. For example, jeopardizing our

international relations may, in the opinion of the Executive, involve performing some act of speech that would break up our alliance with Great Britain in a situation where the Administration is strongly in favor of such an alliance. However, Americans have the right to agitate against alliances with Great Britain or any other power, and such acts are not defined as jeopardizing our international relations by those who perform them, but only by those who favor the alliance in question. Such political judgments cannot be made the basis of a system of classification without arbitrarily limiting free speech and undermining the democratic method.

The system of classification must on the contrary, focus on states of affairs that most can agree upon as harmful enough to warrant extraordinary measures in avoiding them. In practice, these extraordinary measures will require a high level of secrecy.

Second, the three classifications of the present system ought to be replaced with categories having a more functional definition. These categories in turn ought to correspond to somewhat different classification procedures because they reflect different classification needs.

A Right of Privacy category of information is one I would like to see instituted. Revised versions of documents involving the Right of Privacy should be issued by the Government with identifying characteristics of the individual actors deleted. The recent case of Mayor Alioto of San Francisco points up the desirability of establishing penalties for unauthorized disclosure of information privileged in this sense. At times the public interest will require disclosure of the contents of documents without the consent of the individuals involved. Disclosure could be provided for, given specified conditions, and with a court order.

A military information classification is, of course, necessary to a secrecy system devoted to national security. Military strategy, operations, precise capability of forces-in-being, the location of these forces, military applications of science and technology, are matters for classification. The

existence and function, as opposed to the technical characteristics, of our weapons, or plans for new weapons, must, however, be a matter of public record as this kind of information is very relevant to foreign policy formulations. Under this rule, for example, the existence of MIRV and its planned functions would have been public knowledge from inception of the idea in The Pentagon.

Military information should not remain classified when classification is no longer relevant to the ostensible purpose of safeguarding forces in being, or technical knowledge of new weapons. Once a military operation ends, there is no reason why classification of details should continue, unless it can be established that disclosure is likely to adversely affect future military actions. Where this cannot be shown immediate declassification should occur.

Diplomacy generally warrants immediate classification because nations will not enter into open negotiations with one another. International cooperation based on treaty, is necessary to the Physical Security of the United States, moreover and therefore classification of diplomatic activities must also be accepted as necessary.

However, insofar as possible, a time limit (perhaps one year) should be placed on classification of diplomatic negotiations, so that the political process can operate, even if belatedly in this area of foreign policy evaluation. Other nations, will likely object to the disclosure of negotiations, even after a "cooling-off" period. Nevertheless, it must be made clear that disclosure of our foreign policy process is a requisite of our constitutional system of government that other nations will have to tolerate if they wish to deal with us.

Intelligence on other nations has traditionally been a highly classified area of governmental activity. It should remain so where human operatives are engaged in under-cover intelligence gathering. Intelligence gathered from public sources however, or by electronic surveillance, should be made public, so that the public can evaluate our intelligence system, in at least one phase of its operation. True, "They will know some of what we know about what they know." In my view this information will be of very little value, compared to the advantages we will derive by subjecting the intelligence system to greater public scrutiny.

Crisis deliberations are those Executive conferences relating to conflict situations precipitated by others, for example, The Pearl Harbor Attack, a hypothetical nuclear attack upon the United States, and so on, where the time frame forced upon us requires a rapid response. In situations of this sort there may be justification for classification of the deliberations, in order to forestall public pressure on the executive at a time when consultative decision-making is impractical. However, though classified at the time, there ought to be declassification of the official records as soon as practicable. The crisis behavior of the Executive, in short, ought, at least post facto, to be subject to public evaluation. Perhaps a one year time-limit on classification is reasonable in this category of information.

A word is necessary at this point about policy deliberations involving military interventions, where the intervention is at the pleasure of the United States. In such instances - The Bay of Pigs affair is one - deliberations ought to be a matter of public record. I acknowledge the military disadvantages of abandoning surprise, which the course of public deliberation would entail. Where the United States is not immediately threatened however, foreign policy is subject to normal libertarian constraints. These require public debate even of military interventions.

Transactions with other countries, even involving military aid should, in peacetime, be a matter of public record. More specifically, knowledge of what aid is given, of the general character of the activities of American personnel in other nations, of the activities of foreign nationals in our nation, should not be classified.

In sum, I advocate only one level of classification called Classified, and a handful of subject areas for classification decisions. These are: Information affecting Privacy Rights, and Military, Diplomatic, Intelligence, and Crisis Information. A classification system based on these categories and operated on the basis of a classified-unclassified dichotomy, would be constitutional, because limitations on free speech are engaged in only for specific purposes involving the likelihood of physical harm or extreme psychological damage to the United States.

Finally, how will the classification standards just described be enforced? Until now the Executive has set, administered, and regulated the classification standards, claiming that he is constitutionally empowered to do so. I think rather, that all three co-equal branches of government have a responsibility to enforce the Free Speech provisions of the constitution. In order to accomplish this, an independent regulatory agency subject to either the Congress or the Judiciary will need to oversee the Executive's classification decisions. To speak plainly, the workings of the present system illustrate that the Executive Branch of Government, in addition to its constitutional duties, always has short-run political interests which affect its decisions to classify. The truth is, that the Executive cannot be trusted to transcend these political interests in implementing the National Secrecy System. Control of the System must be shared with other branches of the Federal Government, particularly with the Judiciary whose primary purpose is to safeguard the constitution, and its Blessings of Liberty.

FOOTNOTES

1. See for example, Francis E. Rourke, Secrecy and Publicity. Baltimore, Johns Hopkins, 1961, Chaps. 3-5, James Russell Wiggins, Freedom or Secrecy. New York: Oxford University Press, Revised Edition 1964, Chaps. 3-4, and Harold L. Cross, The People's Right to Know. New York, Columbia University Press, Chapters 13-16

2. Bureau of National Affairs, Government Security and Loyalty: A Manual of Laws Regulations and Procedures. July 1970, pp. 15:75 - 15:76

3. Lucien M. Hanks "Another Vietnam? American Aid Is Damaging Thai Society," in Robert Jay Lifton (ed.) America and the Asian Revolutions. Transaction Books, 1970, p. 128

4. In Erwin Knoll and Judith Nies McFadden, American Militarism: 1970. New York: Viking Press, 1969 pp. 68-74

5. Rourke, op. cit., Wiggins op. cit., Cross, op.cit. See also Harry Howe Ransom, Can American Democracy Survive Cold War? Garden City, New York, Anchor Books, 1964 Chaps. 8-9

6. The Ad Hoc balancing test is discussed and case references provided in Thomas Emerson, Toward A General Theory of the First Amendment. New York: Vintage Books edition, 1967 pp. 53-56. See also Samuel Krislov, The Supreme Court and the Political Process, New York, The Free Press, 1968, Chap. 3, esp. pp. 108-114

7. Emerson, op. cit. pp. 56-62, and Chapter 5. Krislov, op. cit. Chap. 3 esp. pp. 95-108, See also pp. 24-39 on the judicial activism - restraint controversy. The classic statement of absolute doctrine is Alexander Meiklejohn, Political Freedom. New York: Oxford University Press, 1960

8. Emerson, op. cit., pp. 53-54

9. Ibid. p. 57

10. Ibid. p. 59

11. Krislov, op. cit. Chapter 3, esp. pp. 95-96.

12. See Footnote 2

13. Rourke, op. cit. pp. 77-78

14. Krislov, op. cit. pp. 124-126

15. Ibid pp.120-122

16. Ibid pp. 122-124

17. Ibid. pp. 116-119

18. Emerson, op. cit. p. 86

19. Ibid, p. 87

20. Meiklejohn, op. cit. p. 49

21. Cf. Mr. Chief Justice Warren's decision in Reynolds V. Sims 377 U.S. 533 (June 15, 1964)

22. The importance to voting of freedom relative to the formulation of electoral alternatives, is very clearly analyzed by Robert A. Dahl in his Preface to Democratic Theory: Chicago, University of Chicago Press, 1956 pp. 67-81

23. Wiggins, op. cit. p. 67

24. See annotation, United States Ex. rel. Touhy V. Ragen 95 L. ed. 427-34

25. Cross, op. cit. Chaps. 15 and 16

26. See Edward S. Corwin, The President, Office and Powers New York, 1957 pp. 110-117, and Glendon A. Schubert, Jr., The Presidency in the Courts. Minneapolis, 1957, pp. 327-33

27. Memorandum of Attorney-General, The Power of the President to Withhold Information from the Congress, compiled by the Sub-Committee on Constitutional Rights of The Senate Committee on the Judiciary, 85th Cong., 2d Sess., Feb. 6, 1958.

28. See Wiggins, op. cit. Chaps. 3 and 4 and Appendix, "Lawyers as Judges of History," for a survey of early history

29. Woodrow Wilson, The New Freedom, New York, Doubleday, Page, and Co., 1913, p. 131